152 U.S. 122

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 233.

THE STEAMSHIP "MAIN," ETC., APPELLANT,

vs.

WILLIAM H. WILLIAMS, MASTER, ETC.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED NOVEMBER 6, 1893.

(14,242.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 11, 1893.

1 THE UNITED STATES OF AMERICA, *District of Maryland*, } *To wit:*

At a circuit court of the United States for the fourth circuit in and for the district of Maryland, begun and held at the court-house, in the city of Baltimore, on the first Monday of April, being the 7th day of the same month, in the year of our Lord one thousand eight hundred and ninety—present, the Honorable Hugh L. Bond, circuit judge; Thomas J. Morris, judge Maryland district; Thomas G. Hayes, Esquire, attorney; George H. Cairnes, Esquire, marshal; Jas. W. Chew, cl'k—among other were the following proceedings, to wit:

WILLIAM H. WILLIAMS, Master of Steamship "Montana," Libellant & Appellee,
vs.
CLAIMANT OF THE STEAMSHIP "MAIN," Respondent & Appellant,

and

NORD DUETSCHER LLOYD, Owner of Steamship "Main," Libellant & Appellant,
vs.
CLAIMANT OF THE STEAMSHIP "MONTANA," Respondent & Appellee.

Appeal from the district court in admiralty on cross-libels in a cause of collision, consolidated.

2 The transcript of the record and proceedings of the district court of the United States for the district of Maryland in the said above-entitled causes, lately depending therein, was filed in the circuit court here on appeal from said district court on the 27th day of June, 1889; which said record, among other things, contains the following proceedings, to wit:

Petition for Appraisement and Order Thereon. Filed January 10th, 1889.

In the District Court of the United States for the District of Maryland. In Admiralty.

WILLIAM H. WILLIAMS
vs.
STEAMSHIP "MAIN."

To the Honorable Thomas J. Morris, judge of said court:

The petition of the Nord Deutscher Lloyd, a steamship company and body corporate of the free Hanseatic city of Bremen, in the German Empire, respectfully represents:

1. That your petitioner is the sole owner of the steamship "Main," now in the port of Baltimore, and whereof Max Moller is master, and of her engines, machinery, boats, tackle, apparel, and furniture, and of the freight then pending at the time of the collision herein-

after mentioned for the voyage on which said steamship was then engaged.

2. That the said steamship has been libelled in this honorable court in a cause of collision, civil and maritime.

3 3. That the said libel has been filed by a certain William H. Williams, master of the steamship "Montana," in behalf of the owners of said steamship and her cargo, claiming damages for loss and injury sustained by said vessel and cargo in consequence of a collision between the said steamship Montana and the said steamship Main, which collision occurred on the afternoon of Saturday, the fifth day of January, 1889, in the Brewerton channel of the Patapsco river, near the mouth thereof, the said Montana being at the time anchored in said channel, bound on a voyage to London, and the said "Main" being on her way to Baltimore, on a voyage from Bremen and New York.

4. That the amount of damages claimed in said libel to have been sustained by the owners of said steamship and her cargo is four hundred and fifty thousand dollars ($450,000), a sum largely in excess of the entire value of the said steamship "Main" and of the freight then pending, and in excess therefor- of the limit of the liability of your petitioner for any loss and injury occasioned by said collision by the law maritime and by the statute law of the United States.

5. That your petitioner has reason to apprehend that other claims and suits may be brought against the said steamship or against your petitioner on account of or growing out of said collision.

6. That your petitioner admits the fact of said collision, but avers that any loss, damage, or injury by said collision was done, occasioned, or incurred without the privity of knowledge of your

4 petitioner, owner as aforesaid of said steamship "Main," and that your petitioner, while reserving the right to contest its liability for such loss, damage, or injury (independently of the limitation of liability herein claimed), desires to claim the benefit of the limitation of liability provided for in the third and fourth sections of the act of Congress of March 3rd, 1851, chapter 43 (sections 4283 and 4284 of the Revised Statutes of the United States).

Wherefore your petitioner prays the court that it will cause due appraisement to be had, according to the rules and practice of the court, of the amount or value of the interest of your petitioner as such owner in said steamship "Main" and her freight for the voyage, and that the amount of the stipulation to be given to release said steamship from arrest may be fixed by the court, and that your petitioner may have all other and proper relief in the premises.

And as in duty, &c.

MARSHALL & HALL
Proctors for Petitioner.

Ordered by the court this 10th day of January, 1889, upon the foregoing petition, that Capt. James McAuley, Wm. B. Rainey, and Edward Futvoye be, and they are hereby, appointed appraisers to ascertain, appraise, and report to this court the value of said steam-

ship "Main," her engines, machinery, boats, tackle, apparel, and furniture, and the amount of freight then pending (on said 5th day of January, 1889) for the voyage of said steamship to Baltimore.

THOS. J. MORRIS,
U. S. District Judge.

5 *Agreement as to Amount of Stipulation and Order of Court Thereon. Filed January 14th, 1889.*

In the District Court of the United States for the District of Maryland. In Admiralty.

WILLIAM H. WILLIAMS
vs.
THE STEAMSHIP "MAIN."

It is agreed by and between the proctors for the respective parties in this case that the value of said steamship Main, her engines, machinery, boats, tackle, apparel, and furniture, be fixed at seventy thousand dollars ($70,000), and that an order of court may be passed, by consent, releasing and discharging said ship from custody and arrest on filing the usual stipulation, with sureties for that amount.

And it is further agreed that the question of the amount of pending freight for which the owners of said steamship may be liable in this action be, and the same is hereby, reserved for adjustment upon further information and subject to the determination of the court, the amount when ascertained to be paid into court or secured as the court may direct.

MARSHALL & HALL,
Proctors for Owner and Claimant.
JOHN H. THOMAS,
E. CALVIN WILLIAMS,
J. WILSON LEAKIN,
Proctors for Libellant.

6 The appraisers appointed by the court upon the petition of the owner and claimant of said steamship "Main" having appraised the value of said ship, her engines, machinery, boats, tackle, apparel, and furniture, at sixty-one thousand dollars ($61,000), and the persons claiming damage against said steamship *and* having objected to said appraisement, and the parties, by the foregoing agreement, having consented that said value shall be taken to be seventy thousand dollars ($70,000), it is now, this 14th day of January, 1889, ordered by this court that upon filing the usual stipulation, with satisfactory sureties, in the said sum of seventy thousand dollars ($70,000), for the payment thereof into court whenever the same shall be ordered, the said steamship Main shall be released and discharged from the custody of the marshal.

And it appearing that the amount of freight pending (returned by the appraisers as $1,577.38) which the claimant of said steamship should secure to be paid into court is disputed and must be

determined by the court, it is further ordered, by the consent and agreement of the parties, that said question be, and it is hereby, reserved, the amount of said freight, when so determined, to be hereafter paid into court or secured as the court may direct.

THOS. J. MORRIS,
District Judge.

7 *Petition for Limitation of Liability and Exhibit "H. G. H."*

Filed May 13th, 1889.

In the District Court of the United States for the District of Maryland. In Admiralty.

WILLIAM H. WILLIAMS
versus
STEAMSHIP "MAIN."

To the honorable the judges of the district court of the United States for the district of Maryland:

The petition of the Nord Deutscher Lloyd, claimant and respondent in the above-entitled cause, respectfully shows—

That your petitioner heretofore, to wit, on the 10th day of January, 1889, filed its petition in this cause, claiming the benefit of the limitation of liability provided for in sections 4283 and 4284 of the Revised Statutes of the United States.

That by an order of court passed in said cause on the 14th day of January, 1889, the value of said steamship "Main," her engines, machinery, boats, tackle, apparel, and furniture, was fixed at the sum of seventy thousand ($70,000) dollars, and that stipulation in the usual form was given for said ship in said amount and said ship thereupon released and discharged.

That by the terms of said order the amount of freight then pending at the time of the happening of the collision in this cause
8 was reserved, to be thereafter determined by this court.

That for the purpose of having the whole extent of its liability, as aforesaid, under said sections 4283 and 4284 of the Revised Statutes of the United States, on account of the value of said ship and of the amount of freight then pending at the time of the happening of the collision aforesaid, now definitely ascertained and determined, your petitioner further respectfully represents to this court that the entire amount of freight then pending at the time of the happening of the collision aforesaid was the gross sum of eleven hundred and sixty-two dollars and eighty cents ($1,162.80), collectable at the port of Baltimore, to which port said ship was then destined, and which said freight-money was payable for freight to be landed at said port. Your petitioner further represents that included in said gross amount of eleven hundred and sixty-two dollars and eighty cents is the sum of eight dollars and six cents ($8.06) for freight paid for the transportation of goods, part of said cargo, from England to Bremerhaven. Your petitioner further represents that said gross amount of freight-money is subject to deduction on ac-

count of certain necessary expenses payable out of the same to the amount two hundred and sixty-nine dollars and one cent ($269.01), leaving the sum of eight hundred and eighty-five dollars and seventy-three cents ($885.73) as the net amount of freight collectable at the port of Baltimore and pending at the time of said collision.

Your petitioner further represents that the entire amount of freight-money on the Baltimore cargo of said ship, including as well that which was prepaid and collected abroad as what was collectable in the port of Baltimore, was two thousand and ten dollars and three cents ($2,010.03), or, making deduction for necessary expenses as aforesaid and freight paid on account of goods shipped from England to Bremerhaven, the net sum of fifteen hundred and sixty-four dollars and eighty cents ($1,564.80); but your petitioner respectfully represents that all of said freight-money which was prepaid and collected in Bremen before said steamship started on her said voyage to Baltimore was so prepaid under an express contract and stipulation that the same was "not to be returned, goods lost or not lost."

Your petitioner further represents that there was prepaid in Bremen passage-money for the passage of certain immigrants on board of said ship to the amount of five thousand two hundred dollars ($5,200), or, less commissions to agents, the net amount of four thousand five hundred and fifty dollars ($4,550), the same being also subject to further deduction on account of United States head-money tax and other expenses; but your petitioner represents that said passage-money so prepaid as aforesaid cannot in any sense be treated or regarded within the meaning of the act of Congress as "freight then pending" at the time of the collision.

Your petitioner further represents that there was a considerable amount of freight-money earned upon said voyage from Bremen for cargo consigned to and delivered at the port of New York prior to the happening of said collision; that part of said freight-money was prepaid as aforesaid under the same contract and stipulation that the same was "not to be returned, goods lost or not lost," and that the balance was collected at the port of New York, where the same became due and payable upon the arrival of said steamship Main at said port and the delivery of her said cargo; but your petitioner respectfully submits that said freight-money so previously earned and paid cannot be considered in any possible sense of the word as "freight then pending" at the time of the collision, and your petitioner therefore submits at this time no further or particular account of the same, deeming the same wholly unnecessary and irrelevant, as much so as would be a statement of the freight earned by the said steamship on any of her previous voyages.

Your petitioner, however, submits herewith detailed statements of the freight collectable at Baltimore and pending at the time of said collision; also of freight prepaid at Bremen on Baltimore cargo, marked statement H. G. H., and prays that the same may be taken as part of this petition.

Your petitioner therefore prays that this honorable court may be pleased to ascertain and declare by its order or decree passed in the premises the entire limit of the amount of the liability of this petitioner, under the provisions of the Revised Statutes as aforesaid, on account of the value of said steamship "Main," already ascertained, as aforesaid, by the order of this court to be seventy thousand ($70,000) dollars, and of the "freight then pending" at the time of
11 the collision.

And your petitioner further prays that this honorable court will cause a monition to issue against all persons claiming damages for any loss, damage, or injury by said collision, citing them to appear before this court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same, and prescribing such notice to be given thereof as this court in its discretion may direct.

And your petitioner further prays that in the meantime an order may be made by this honorable court restraining the prosecution of all and any suit or suits against this petitioner in respect of any such claim or claims.

And, as in duty, &c.

MARSHALL & HALL,
Proctors for Petitioner.

12 EXHIBIT "H. G. H."

Main I. Voyage, 1889.

Statement of Entire Freight-money Collected Abroad and in Baltimore on Baltimore Cargo.

From England, £49.4, at 4.89	$240 59	
" Bremen, mj. 385, at 24	92 40	
" do.	1,677 04	
	$2,010 03	
Less freight from England to Bremerhaven, £5.8, 4.89	26 41	
		$1,983 62

Expenses on Cargo.

1. Cost of lighterage, Bremen to Bremerhaven	$113 52	
2. Cost of loading at Bremerhaven	94 60	
3. Cost of unloading at Baltimore	141 90	
4. Collecting freight here and abroad	53 80	
5. Sundry expenses	15	
		418 82
		$1,564 80

E. & O. E.
Balto., April, 1889.

p. p. A. SCHUMACHER & CO.
H. G. HILKEN.

Main I. Voyage, 1889.

Statement of Freight-money Collectable at Baltimore.

From England, £15.3, 4.89	$74 08	
" Bremen	1,088 72	
	$1,162 80	
Less fr't from England to Bremerhaven, £1.13, 4.89	8 06	
		$1,154 74

Expenses.

1. Cost of lighterage, Bremen to Bremerhaven	$74 64	
2. Cost of loading at Bremerhaven	62 20	
3. Cost of unloading at Baltimore	93 30	
4. Collecting freight at Baltimore	28 87	
5. Sundry expenses	10	
		269 01
		$885 73

E. & O. E.
Baltimore, April, 1889.

p. p. A. SCHUMACHER & CO.
H. G. HILKEN.

13 *Decree Determining Amount of Liability for Freight.*

Filed 11th June, 1889.

In the District Court of the United States for the District of Maryland. In Admiralty.

WILLIAM H. WILLIAMS
vs.
STEAMSHIP "MAIN."

In the matter of the petition of the Nord Deutscher Lloyd, claimant and respondent in the above-entitled cause, heretofore filed therein on the 13th day of May, 1889, praying the court to ascertain and declare by its order and decree, passed in the premises, the entire limit of the amount of the liability of said petitioner under the provisions of sections 4283 and 4284 of the Revised Statutes of the United States, on account of the freight of the steamship "Main" pending at the time of the happening of said collision, the said petition and Exhibit Statement H. G. H. filed therewith being by the court duly read and considered, and the parties to said cause having been heard, by their counsel, and it appearing to the court that the said petitioner is liable to the extent of the gross amount of the freight on the cargo on board of said ship at the time of said collision, as well for such part of said freight as had been prepaid at the port of Bremen as for the part thereof which was collectible at the port of Baltimore, and that

said gross freight amounts to the sum of $2,010.03, from which amount, however, the petitioner is entitled to have deducted the sum of $26.41, paid for the transportation of goods, part of said cargo, from England to Bremen Haven, and the further sum of $113.52, paid for the lighterage of goods delivered on board
14 of said ship at Bremen Haven, leaving the actual amount of gross freight on said cargo for which said petitioner in these proceedings is justly chargeable the sum of $1,870.10; and it further appearing that said petitioner has received the sum of $5,200, being the gross passage-money or freight prepaid at the port of Bremen for the transportation of immigrants who were passengers on board of said ship at the time of said collision, on her said voyage from Bremen to Baltimore, and that said petitioner is liable in these proceedings for the whole of said sum, without any deductions therefrom on account of commissions paid to agents or United States head-money tax or on any other account:

It is thereupon, this 11th day of June, 1889, by the court adjudged, ordered, and decreed that the liability of the said petitioner in these proceedings on account of freight and passage money as aforesaid pending at the time of the happening of the said collision in the proceedings mentioned amounts to the sum of $7,070.10; and it is further adjudged, ordered, and decreed that on payment of said last-mentioned sum of money into the registry of this court, or on giving a stipulation in the usual form therefor, with security to be approved of by the court, such restraining order may be passed and such further proceedings may be had in the premises as by said provisions of the Revised Statutes and rules of court in reference thereto may be necessary and proper for the purpose of limiting the liability of said petitioner.

THOS. J. MORRIS,
District Judge.

15 *Prayer of Appeal and Order of Court Thereon.*

Filed 22d June, 1889.

In U. S. District Court, District of Maryland. In Admiralty.

WILLIAM H. WILLIAMS
vs.
STEAMSHIP "MAIN."

To the Honorable Thos. J. Morris, judge of the district court:

The respondent having heretofore prayed and obtained an appeal from the decree of the district court in the above cause passed on the 13th day of May, 1889, also prays an appeal from the subsequent decree or order passed on 11th June, 1889, fixing the amount of freight and passage money pending at the time of the collision, and also prays the court to fix the amount of penalty of the appeal bond to be given upon the last-mentioned appeal.

MARSHALL & HALL,
Proctors for Respondents.

Ordered, upon the above application, that the appeal be allowed as prayed, and that the appeal bond be given in the penalty of fourteen thousand dollars.

THOS. J. MORRIS, *D't Judge.*

June 22d, 1889.

16 *Appeal Bond.*

Filed 24th June, 1889.

Know all men by these presents that we, George A. Von Lingen and Henry G. Hilken, are held firmly bound unto William H. Williams in the sum of fourteen thousand dollars, current money, to be paid to the said William H. Williams, his certain attorney, executors, administrators, or assigns; to the payment of which, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-fourth day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a district court of the United States for the district of Maryland, in a cause depending therein, between the said William H. Williams, master, &c., libellant, and The Claimant of the Steamship "Main," respondent, a decree or order was passed on the 11th day of June, 1889, fixing the amount of freight and passage money pending at the time of the collision at $7,070.10; from which said decree or order the said respondent has prayed and obtained an appeal to the circuit court of the United States for the district of Maryland:

Now, the condition of the above obligation is such that if the claimant of the said steamship "Main" shall prosecute its said appeal with effect, and shall pay into court such sum of money as shall be finally determined to be the amount of freight and passage
17 money pending at the time of said collision, and required to be paid by said appellant into court in order to obtain the benefit of the limitation of its liability as claimed in its original petition, and perform and fulfil any decree that may be passed by the said circuit court in the premises, then the above obligation shall be void; otherwise to be and remain in full force and virtue.

GEORGE A. VON LINGEN. [SEAL.]
HENRY G. HILKEN. [SEAL.]

Signed, sealed, and delivered in presence of—

E. SALZER.
THOS. T. BOSWELL.

Endorsed: "Bond approved. Thos. J. Morris, judge."

18 *Findings of the Circuit Court as to Amount of Freight-money Pending at the Time of the Collision.*

Filed May 9, 1890.

In the Circuit Court of the United States for the District of Maryland. In Admiralty.

WILLIAM H. WILLIAMS
vs.
THE STEAMSHIP MAIN (THE NORD DEUTSCHER LLOYD, Owner and Claimant).

Finding of facts by the court.

In the matter of the appeal of the Nord Deutscher Lloyd, owner and claimant of the steamship Main, from the decree of the district court passed herein on the 11th day of June, 1889, ascertaining and determining the liability of the said appellant on account of freight pending at the time of the happening of the collision in the proceedings mentioned.

1st. That the collision in the proceedings mentioned between said steamship Main and the steamship Montana in the Brewerton channel of the Patapsco river on the 5th of January, 1889, occurred solely through the fault of the steamship "Main" and of those in charge of her navigation, and the damage occasioned thereby to the owners of the Montana amounted to $163,547.45, and to the owners of the cargo on board of the Montana amounted to $80,065.96, making an aggregate of $243,633.41.

2nd. That at the time of the happening of the said collision the said steamship Main had on board goods and merchandise
19 on which gross freight-money for the voyage from Bremen to the amount of $1,162.80 was collectable at the port of Baltimore, and on which gross freight-money to the amount of $847.23 had been prepaid at the port of Bremen under an express stipulation and agreement that said freight-money so prepaid was "not to be returned, goods lost or not lost," making an aggregate of gross freight, including that which — so prepaid as aforesaid as well as that which was collectible at Baltimore for said voyage from Bremen of $2,010.03; that out of said freight-money there is to be deducted the sum of $26.41, paid for the transportation of goods from England to Bremerhaven, and the sum of $113.52, paid for the lighterage of goods at Bremerhaven, leaving as the actual amount of gross freight for said voyage on said goods the sum of $1,870.10 or $1,564.80 net freight, after deducting cost of unloading cargo and other expenses incident thereto at the port of Baltimore; that in addition to said freight-money there had been prepaid at Bremen the further sum of $5,200, gross passage-money for the immigrants who were on board of said ship at the time of the happening of said collision, or, allowing for the commission received by the agents through whom said passage-money was prepaid, the sum of $4,550

nett, without any deduction for the "head-money tax" due under the laws of the United States at the port of Baltimore on account of said immigrants, and that the aggregate amount of said gross freight prepaid at Bremen or collectible at the port of Baltimore and of said gross passenger fares prepaid at Bremen for said voyage is $7,070.10.

20 *Findings of Law by the Court.*

That the obligors in the appeal bond in the appeal from the decree of the district court of June 11th, 1889, fixing the amount of value of the interest of the owners of the "Main" in her freight pending at the time of the collision are liable to the amount of $7,070.10, with interest thereon from the date of said decree until paid, and all of the costs resulting from said appeal.

HUGH L. BOND, *C't Judge.*

Decree.

Filed May 14th, 1890.

In the Circuit Court of the United States for the District of Maryland.

THE NORD DEUTSCHER LLOYD, Appellant,
vs.
WILLIAM H. WILLIAMS.

The matter of the appeal from the decree of the district court passed on the 11th day of June, 1889, having been duly considered, after the arguments of the proctors for the respective parties had been heard and considered, it is thereupon, this 14th day of May, eighteen hundred and ninety, adjudged, ordered, and decreed that the amount or value of the interest of the appellant in the freight of the steamship "Main" pending at the time of the collision between her and the steamship "Montana," which occurred
21 on the 5th day of January, 1889, was seven thousand and seventy dollars and ten cents ($7,070.10); and it is further adjudged, ordered, and decreed that within ten days from the date hereof George A. Von Lingen and Henry Hilken, the sureties on the bond for an appeal from the decree or order of the district court which was rendered on the 11th day of June, 1889, shall pay into court the said sum of seven thousand and seventy dollars and ten cents ($7,070.10), with interest thereon at the rate of six per cent. per annum from the 11th day of June, 1889, and all of the costs in both courts incident to the proceedings to ascertain and determine the amount or value of the interest of the owner of the steamship "Main" in her freight pending at the time of said collision; and it is further adjudged, ordered, and decreed that upon the payment of said moneys into court, and also of the sum of seventy thousand dollars ($70,000), the agreed valuation of the amount or

value of the interest of the appellant in said steamship "Main" at the time of said collision, with interest on said last-mentioned sum at the rate of six per cent. per annum from the 14th day of May, 1889, until paid, and all of the costs in the case of Williams against the steamship "Main" on both sides, in the district court and in this court, an injunction shall issue prohibiting and restraining all persons and corporations from prosecuting any claims against the Nord Deutscher Lloyd or against the said steamship "Main" for damages, destruction, loss, or injury resulting from the collision which occurred between the steamships "Main" and "Montana" on the 5th day of January, 1889, otherwise than
22 by claiming the right to participate in the funds which may be paid into court for distribution among them under the order of this court.

And it appearing to the court that a large number of persons and corporations having claims against said funds arising from said collision have already filed and proved their said claims before William Cunningham, an insurance adjuster, for the purpose of an adjustment as between said claimants, and that an adjustment has been made by him satisfactory to them all, it is further adjudged, ordered, and decreed that the said William Cunningham be, and he hereby is, appointed special commissioner to take such further proof of claims as may be necessary or considered by any one desirable; that the said Cunningham shall report to this court the amount and owner of each of such claims as has been or may be hereafter proven before him, accompanied with an account, in which, after deducting from the fund to be paid into court all expenses connected therewith, he shall distribute the balance among said claimants, all of which shall be subject to exceptions on the part of any one interested therein and subject to the approval of this court.

And it is further adjudged and ordered that all claims which have already been presented and proved before said Cunningham and any adjustment which shall have been made by him as between said claimants shall be considered as having been proved before and made by him in pursuance of this order, subject to the
23 rights of any persons interested in disputing the same to except thereto.

And it is further adjudged, ordered, and decreed that a monition be issued against all persons and corporations who have any claims against said steamship "Main" or her owners for loss, destruction, damage, or injury resulting from the collision which occurred between her and the steamship "Montana" on the 5th day of January, 1889, citing them to appear in this court on or before the 20th day of August, 1890, and make due proof thereof.

HUGH L. BOND, *C't Judge.*

Prayer of Appeal to the Supreme Court and Order Allowing Same.

Filed June 13, 1890.

In the Circuit Court of the United States for the District of Maryland.

WILLIAM H. WILLIAMS, Master of the Steamship Montana, *vs.* THE STEAMSHIP MAIN.	In Admiralty.

To the honorable the judge of said court:

The Nord Deutscher Lloyd, owner of said steamship Main, prays to be allowed an appeal to the Supreme Court of the United States from the decree of this honorable court in the above-entitled cause, passed therein on the 14th day of May, 1890, fixing the amount of liability of said owner on account of freight at $7,070.10 and decreeing payment thereof, and asks the court to prescribe
24 the amount of the appeal bond to be filed.

And as, &c.

TH. W. HALL,
Proctor for Nord Deutscher Lloyd.

Appeal allowed and penalty of the bond fixed at $14,000.
13th June, 1890.

THOS. J. MORRIS, *Judge.*

Appeal Bond.

Filed June 13, 1890.

Know all men by these presents that we, George A. Von Lingen, Henry G. Hilken, are held and firmly bound unto William H. Williams in the sum of fourteen thousand dollars, current money, to be paid to the said William H. Williams, his certain attorney, executors, administrators, or assigns: to the payment of which, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this thirteenth day of June, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a circuit court of the United States for the district of Maryland, in a cause depending therein between the said William H. Williams, master of the steamship "Montana," libellant, and The Claimant of the Steamship "Main," respondent, on appeal from the decree of the district court of the United States for the district of Maryland, in a cause of collision, in
25 admiralty, a decree was passed by the said circuit court on the 14th day of May, 1890, fixing the amount of liability of said respondent on account of freight pending at the time of the collision at $7,070.10 and decreeing payment thereof, from which

said decree the said respondent has prayed and obtained an appeal to the next term of the Supreme Court of the United States:

Now, the condition of the above obligation is such that if the claimant of the said steamship "Main" shall prosecute its said appeal with effect and shall pay into court such sum of money as shall be finally determined to be the amount of freight and passage money pending at the time of said collision and required to be paid into court in order to obtain the benefit of the limitation of its liability as claimed in its original petition, and perform and fulfil any decree that may be passed by the said Supreme Court of the United States in the premises, then the above obligation shall be void; otherwise to be and remain in full force and virtue.

GEORGE A. VON LINGEN. [SEAL.]
HENRY G. HILKEN. [SEAL.]

Signed, sealed, and delivered in presence of—
G. SCHNEYDER.

The aforegoing bond is thus endorsed, to wit: "Bond approved. Thos. J. Morris, judge."

And thereupon it is ordered by the court here that a transcript of the record and proceedings aforesaid, with all things
26 relating to the same, be transmitted to the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, in accordance with rule 8, section 6, of the rules of the Supreme Court.

And the same is transmitted accordingly.

JAMES W. CHEW, *Clerk.*

The United States of America to William H. Williams, master of steamship "Montana," Greeting:

[The Seal of the Circuit Court, Maryland.]

You are cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal from a decree of the circuit court of the United States for the fourth circuit in and for the Maryland district, passed in admiralty, wherein the claimant of the steamship "Main" is appellant and you are appellee, to show cause, if any there be, why the decree passed as aforesaid against the said appellant should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand and seal on this 17th day of June, 1890.

THOS. J. MORRIS, *Judge.* [SEAL.]

Service of citation admitted on this 17th day of June, 1890.

JOHN H. THOMAS,
Of Counsel for Appellee.

(Endorsed:) Williams *vs.* Steamship "Main." Citation.

27 *Agreement as to Record.*

In the Circuit Court of the United States for the District of Maryland.

WILLIAM H. WILLIAMS
vs.
THE STEAMSHIP "MAIN."

As the record now on file in the Supreme Court of the United States contains matter which is not necessary for the appeal and with which that court ought not be troubled and omits matter which is necessary for the appeal, it is hereby agreed that the above record shall be transmitted to said court and substituted for that heretofore filed, and that for the purposes of this appeal the above record shall be considered as having been filed within the time required by law and the rules of court.

THOMAS W. HALL,
Proctor for Appellant.
JOHN H. THOMAS,
J. WILSON LEAKIN,
GEO. LEIPER THOMAS,
Proctors for Appellee.

28 UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

I, James W. Chew, clerk of the circuit court of the United States for the district of Maryland, do certify that the foregoing is truly taken from the record and proceedings of the said circuit court in the therein-entitled cause, made in pursuance of rule 8, section 6, of the rules of the Supreme Court.

The Seal of the Circuit Court, Maryland.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court on this 27th day of October, A. D. 1893.

JAS. W. CHEW,
Clerk of said Circuit Court.

29 In the Supreme Court of the United States, October Term, 1893.

THE STEAMSHIP "MAIN," &C., THE NORD DEUTSCHER LLOYD, Claimant, Appellant,
vs.
WILLIAM H. WILLIAMS, Master of the Steamship "Montana." } Term No., 233.

As the transcript of record heretofore transmitted contains matter which is not necessary for this appeal and with which this court ought not to be troubled and omits matter which is necessary for this appeal, it is now hereby agreed between counsel that, with the leave of this court, there shall be substituted for said record a trans-

script of record which has been since prepared under the agreement of counsel and duly certified by the clerk of the circuit court, with leave to refer, if necessary, to the transcript of record now on file, the substituted transcript of record to be considered as having been filed within the time required by law.

TH. W. HALL,
Proctor for Appellant.
JOHN H. THOMAS,
GEO. LEIPER THOMAS,
J. WILSON LEAKIN,
Proctors for Appellee.

30 In the Supreme Court of the United States, October Term, 1893.

THE STEAMSHIP "MAIN," &c., THE NORD DEUTSCHER LLOYD, Claimant, Appellant,
vs.
WILLIAM H. WILLIAMS, Master of the Steamship "Montana."
} Term No., 233.

To the honorable the judges of the Supreme Court of the United States:

The counsel on both sides in the above-entitled cause having agreed that the transcript of record heretofore transmitted contains matter which is not necessary to this appeal and with which this court ought not to be troubled, and also omits matter which is necessary to this appeal, and that, if this court will so permit, a new and corrected transcript of record, which has since been prepared and duly certified by the clerk of the circuit court, shall be substituted for the same, with leave to refer, if necessary, to said transcript of record already on file, the substituted transcript of record to be considered as having been filed within the time required by law, the counsel for the appellant now respectfully prays leave to file said agreement with said new and corrected transcript of record therein referred to, to have the effect provided for in said agreement and to be subject to the reservation therein contained.

THOMAS W. HALL,
Attorney for Appellant.

31 The appellee admits the allegations contained in the within application and agrees that said application may be granted.

JOHN H. THOMAS,
GEO. LEIPER THOMAS,
J. WILSON LEAKIN,
Attorneys for Appellee.

Endorsed on cover: Case No. 14,242. Supreme Court U. S., October term, 1892. Term No., 233. The Steamship "Main," &c., appellant, *vs.* William H. Williams, master, &c. Stipulation and agreed record. Filed November 6, 1893.

Office Supreme Court U. S.
FILED.
JAN 24 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1893.

TERM No. 233.

THE STEAMSHIP "MAIN," &c., THE NORD-DEUTSCHER LLOYD, CLAIMANT,

Appellant,

vs.

WILLIAM H. WILLIAMS, MASTER OF THE STEAMSHIP "MONTANA."

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF OF COUNSEL FOR APPELLANT.

THOMAS W. HALL,
Counsel.

Supreme Court of the United States

OCTOBER TERM, 1893.

TERM No. 233.

THE STEAMSHIP "MAIN," &c., THE NORD-DEUTSCHER LLOYD, CLAIMANT,

Appellant,

vs.

WILLIAM H. WILLIAMS, MASTER OF THE STEAMSHIP "MONTANA."

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF OF COUNSEL FOR APPELLANT.

The question presented for the consideration of the Court in this case is one of statutory construction. It is as to the meaning of the three words "freight then pending," in the Act of Congress limiting the liability of ship owners in certain cases, including collisions, happening without their knowledge or privity. The Statute in question, Section 4283 of the Revised Statutes of the United States, reads as follows:

"4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter or thing, lost, damage or forfeiture done, occasioned, or incurred, without the privity or knowledge of

such owner or owners, shall in no case exceed the amount of value of the interest of such owner in such vessel, and her freight then pending."

The case in which the present question has arisen, and the circumstances under which it comes before this Court for consideration, may be briefly stated. In January, 1889, the German Steamship Main, the property of The Nord-Deutscher Lloyd, the appellant in this case, came into collision with the British Steamship Montana, in the Brewerton Channel of the Patapsco river, leading to the port of Baltimore. The Main was bound on a voyage from Bremen to New York and Baltimore, with steerage passengers and a cargo on board. The Montana was unfortunately sunk in the collision; the Main, but slightly injured, proceeded to her dock in Baltimore, where she landed her steerage passengers, and the balance of her cargo not already landed at New York. Cross libels were filed in the District Court of the United States for the District of Maryland, and by the decree of said Court the liability for the collision and sinking of the Montana was fixed upon the Main, which decree was afterwards affirmed by the Circuit Court.

Pending proceedings in the District Court, the appellant, claimant and owner of the steamship Main, filed its petition under the Act of Congress for a limitation of liability, and obtained the proper order of Court thereon. The value of the steamship and her appurtenances was fixed by appraisement at $61,000, but, subsequently, by consent, at the sum of $70,000; which amount, after the decree of the Circuit Court, holding the Main responsible for the collision, and from which decree no appeal was taken, was duly paid into Court under said decree, and has been distributed among the parties entitled thereto. A controversy having arisen as to the amount of the liability of the Appellant, under the Act of Congress, on account of "freight then pending," said question was reserved for separate consideration. The decree of the Circuit Court, from which the present appeal is taken, fixing the amount of the liability of the appellant on account of its

interest in "freight then pending" at the sum of $7,070.10, together with the findings of said Court of fact and law upon which said decree was based, will be found in the Agreed Record, pages 10, 11.

By the findings of fact in question, Agreed Record, page 10, it appears that at the time of the happening of the collision, the steamship Main had on board goods and merchandise, on which gross freight money for the voyage from Bremen to Baltimore was collectible at Baltimore, to the amount of $1,162.80, and gross freight money to the amount of $847.23 had been prepaid at Bremen, under an express stipulation and agreement that said freight money so prepaid was "not to be returned goods lost or not lost." These two amounts made an aggregate of "gross freight," including that which was prepaid as aforesaid of $2,010.03. Allowing for certain deductions mentioned in said findings of fact, the Court found as the actual amount of freight for said voyage, including the amount prepaid at Bremen, as aforesaid, the sum of $1,870.10. The Court further found that, in addition to said freight money, there had been prepaid at Bremen the further sum of $5,200 gross *passage money* for the immigrants who were on board the said steamship Main at the time of the collision, or allowing for commissions paid to agents through whom said passage money was prepaid, the sum of $4,550 net.

Upon these facts, as found by the Court, the Court found, as matter of law, that the amount or value of the interest of the appellant, the owner of the Main, in her "freight pending" at the time of the collision was the sum of $7,070.10, being the gross amount of freight money on goods to Baltimore, whether prepaid or not, as found by the Court, viz. $1,870.10, and the gross amount of prepaid passage money namely, $5,200, without allowance for commissions to agents.

The present appeal is taken from the decree of the Circuit Court based upon these findings, and which is for said sum of $7,070.10, with interest from the 14th day of May, 1889, until paid.

ASSIGNMENT OF ERRORS.

And, for an assignment of errors in said findings of law and said decree, the appellant says:

FIRST: That said Circuit Court erred in treating said sum of $5,200, the gross passage money for immigrants on board of said steamship Main, prepaid at the port of Bremen before the commencement of said voyage, as "freight then pending" at the time of the happening of the collision in this case.

SECOND: That said court further erred in its findings of law and decree in treating the sum of $847.23, freight money on goods and merchandise on board of said steamship, *which had been prepaid at the port of Bremen* under an express stipulation and agreement that said freight money so prepaid "was not to be returned, goods lost or not lost," as "freight then pending" at the time of the collision, and within the meaning of the Act of Congress.

POINTS.

I.

The question being thus narrowed down to the simple one of the meaning to be attached to the words "freight then pending," in the Act of Congress, the appellant insists, with all respect, that, in accordance with every settled principle of statutory construction, the meaning to be given to those words is the usual and ordinary one in connection with the subject-matter, and that the question is a simple one because the ordinary and usual meaning of said words is fixed by common usage and by legal decision.

The word "freight" has, at most, in the English language, two acceptations. It is used as signifying: *first*, the burden or thing carried, whether by land or sea; *secondly*, the hire, price or compensation paid for the carriage or transportation of goods or merchandise. Thus Worcester defines "freight":

1. The cargo or lading of a ship.

2. The burden or load of the carriages used upon railroads for transportation.

3. The money due for the transportation of goods; freightage.

And "freightage" he subsequently defines as money due, charged, or paid, for freight.

So Webster defines "freight":

1. That with which anything is fraught or laden for transportation; lading; cargo, especially of a ship, or of a car or a railroad, etc.; as, a *freight* of cotton, a full *freight*.

2. (*Law*) (*a*) The sum paid by a party hiring a ship, or part of a ship, for the use of what is thus hired. (*b*) The price paid a common carrier for the carriage of goods.— *Wharton.*

Nowhere is "freight" defined to be the hire or compensation paid for the transportation of passengers, no more than in common parlance "freight trains" and "freight cars" are the same as passenger trains and passenger coaches.

By legal authority, the definition of "freight," naturally more exact, rigorously excludes the idea that it includes passage money.

To cite but a few of these definitions:

"'Freight' is the reward payable to the carrier for the safe carriage and delivery of the *goods*."

Kirchner vs. Venus, 12 *Moore, P. C.*, 390. (Per Judicial Committee of the Privy Council, 1859.)

"'Freight,' in the ordinary mercantile sense, is the reward payable to the carrier, for the carriage and arrival of the *goods* ready to be delivered to the merchant."

Scrutton on Charter Parties and Bills of Lading, Art. 136.

"'Freight' means the price to be paid for *the carriage of goods* to their destination and *not* the price to be paid for receiving goods to be carried, *or for carrying passengers*."

Newson's Law of Shipping, Art. 74.

"'Freight' is the reward payable for the safe conveyance and delivery of *goods* entrusted for that purpose to a carrier by sea; the title thereto is conditional on performance, and payment thereof is secured to him by a lien at common law on the goods carried."

Machlachlan, Law of Shipping, pp. 474-5; (4th Ed., 1892.)

"The word 'freight,' when not used in any sense to imply the burden or loading of the ship, or the cargo which she has on board, is the hire agreed upon between the owner or master for *the carriage of goods* from one port or place to another. That hire, without a different stipulation by the parties, is only payable when the merchandise is in readiness to be delivered to the person having the right to receive it."

Brittan vs. Barnaby, 21 *Howard*, p. 533.

II.

Not only do the definitions given of the word "freight," whether by lexicographers or by the courts, negative and exclude any idea that the money, commonly called "fares," paid for the transportation of passengers, is included in or covered by the term "freight," but the courts, when asked, have expressly refused so to extend the meaning of the word. Thus, in the latest edition of *Abbott on Shipping* (13th Ed., 1892), p. 538, it is expressly stated that "passage money has been held not to be freight." In an action by a broker to recover commissions upon his contract to obtain freight for a ship on a voyage from London to New South Wales, it was held that the passage money of steerage passengers procured by him, could not be included in the estimate of the amount of freight, the words "cargo" and "freight" being terms applicable to *goods only*.

Lewis vs. Marshall, 7 *Man. & Gr.* 729.

So, in a suit brought to recover on a policy of insurance valued on freight, where the ship had been lost with a cargo of rice and coolies on board for Mauritius, it was held that

the word "freight" in the policy, did not include the passage money of the coolies.

Denoon vs. Home & Colonial Ass. Co. L. R. 7 C. P. 341.

In the latest edition of *Machlachlan on Shipping*, (4th Ed., 1892), pp. 338–9, the distinction between "freight" and "passage money," is clearly pointed out and emphasized. Freight, as this court has said in Brittan vs. Barnaby, 21 Howard, 538, is ordinarily only due and payable upon the completion of the voyage and delivery of the goods. Passage money is ordinarily payable in advance, and may be sued for and recovered, notwithstanding the loss of ship and all on board.

Moffatt vs. E. I. Co., 10 *East* 468–474.

Freight is also secured to the ship owner by a lien on the goods carried. There is no such lien upon the persons of passengers.

III.

The Statute (Sec. 4,283, Revised Statutes) is Sec. 3 of the Act of Congress of 1851, Chap. 43, which first made provision, by federal law, for a limitation of the liability of ship owners, such as already existed by the general maritime law, by Act of Parliament in Great Britain, and by State law in Maine and Massachusetts. Judge Parsons, in his work on the Law of Shipping and Admiralty (Vol. 2, p. 121), says that the Act of Congress was principally taken from the English Statute 26 Geroge III, and from the Rev. Statutes of Maine of 1840, Chap. 47. He also says, on p. 125, that Sec. 3 of the Act of 1851 is nearly the same as Sec. 8 of the Maine Statute of 1840, Chap. 7, meaning, of course, Chap. 47. The differences in the wording, however, of the Act of Congress, the Act of Parliament and the Maine Statute, are very material in the consideration of the present case. Thus, the clause "or for any loss, damage, or injury *by collision*," in the Act of Congress, is not to be found in the Statutes of Maine or Massachusetts, in the English Statute 26 George III, or, in these words, in any of the English Statutes. The particular clause submitted for con-

sideration in this case "freight *then pending*," is also very differently expressed, and has a different meaning, from the language of any of the other Statutes referred to.

Thus, the Statute 26 George III, Chap. 86, limits the liability of owners in the cases specified in the Statute (robbery, embezzlement, &c.), to "the value of the ship or vessel with all her appurtenances, *and the full amount of the freight due or to grow due*, for and during the voyage whereon such robbery, embezzlement, etc., shall be made, committed or done." The Maine Statute (1840, Chap. 47, Sec. 8), and the Massachusetts Statute which it follows, (Revised Stat., 1835, Chap. 32, Sec. 1), simply say "no ship owner shall be answerable beyond the amount of his interest in the ship and freight for any embezzlement, etc." While these Statutes are *in pari materia* it is evident that they are very far from being *in totidem verbis*. Not only is there a complete departure in the Act of Congress from the language of the British Statute, but the addition to the simple word "freight" found in the Maine and Massachusetts Statutes, of the words "*then pending*," cannot be supposed to be without significance and intention. It is not necessary to quote lexicographers for the meaning of the word "pending." The words "*then pending*" not only limit the owner's liability on account of "freight" to the amount of freight pending at the time of the collision, but also to the amount of freight depending and contingent upon the termination of the voyage and the delivery of the goods. Otherwise, these words are utterly without meaning and mere surplusage. In its opinion in the case of *The City of Norwich* 118 U. S., p. 491, construing this very Statute and Section, this court has said: "Pending freight is of no value to the ship owner until it is earned, and it is not earned, if earned at all, until the conclusion of the voyage."

IV.

The rule of statutory construction, applicable to this case, is well settled. Congress must be presumed to have understood the meaning of the words employed in the Statute, and

to have employed those words in their usual and ordinary sense. Says Mr. Sedgwick in his work on the *Construction of Statutory and Constitutional Law*, p. 220: "The rule is well expressed by Parke B. in the English Exchequer. 'The rule which the Courts have constantly acted on of late years in construing Acts of Parliament or other instruments, is to take the words in their ordinary, grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument or would lead to some other inconvenience or absurdity.' 'The current of authority at the present day', says the Supreme Court of New York, 'is in favor of reading Statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpos of either limiting or extending their operation. Courts cannot correct what they may deem either excesses or omissions in legislation, nor relieve against the occasionally harsh operation of statutory provisions without the danger of doing vastly more mischief than good.'" Further on, adds Mr. Sedgwick, (p. 220: "If the Courts could give to phrases new, unusual, forced, or strained interpretations; if they could insert a word here or strike out a word there, all idea of conforming to the legislative intent would be lost, and cases, turning on the construction of doubtful statutes, would soon come to be decided either on judicial notions of policy, or on the peculiar equities of the particular matter in hand."

So, said this Court, laying down a general rule of construction in Martin v. Hunter, 1 Wheaton, p. 326, "The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."

V.

It is precisely in this spirit, and according to these rules, that this Court has already construed the identical Section 4283 of the Rev. Stat. now under consideration. In the three cases of *The City of Norwich*, *The Scotland* and *The Great Western*, reported in 118 U. S., pp. 468 to 541, this Court was

called upon to construe the meaning of the word "*interest*," in the very clause now under consideration, which limits the liability of the ship owner to "the amount or value of the interest of such owner in such vessel and her freight then pending." In these cases, which were argued and are reported with great fulness, this Court was pressed to extend the meaning of the word "interest," so as to include any insurance which the owner might have on the ship or freight, in the amount for which he should be held liable. In one of these cases, *The Scotland*, also a case of collision, the decree against The Scotland, the vessel found in fault, was for $250,000. The Scotland sank after the collision, and the sum of $4,927.35 represented the total value of her strippings, being all that was saved from the wreck. Before the collision, the Scotland was valued at 100,000 pounds sterling, and the insurance effected on her and received by her owners was 61,647 pounds, equal to $299,867.42. In all the cases, stress was laid upon the supposed hardship of the case, and the learning of the general maritime law was exhausted in argument, in the endeavor to satisfy this Court that the insurance money received by the ship owner should be included in his "interest in the ship and freight." This Court refused to enlarge by construction the meaning of the word "interest." In the opinion of the Court, in the first of the cases referred to, that of *The City of Norwich*, 118 U. S., p. 495, after fully stating the contention in the case, it is said, "The truth is that the whole question after all comes back to this: whether a limited liability of ship-owners is consonant to public policy or not. Congress has declared that it is, and they, and not we, are the judges of that question. Having, as we think, ascertained the true construction of the Statute, the point in dispute is really settled. It is a question of construction, and does not require an examination of the general maritime law to determine it. If the rule of the maritime law is different, the Statute must prevail."

With the citation of these cases and in reliance upon the rule thus stated, the appellant confidently submits its case,

believing that the words of the Act of Congress, and those words only, "must prevail," and not any supposed equity or policy, whether claimed to be founded upon the general maritime law, or based upon any construction of other statutes, differently worded. The appellant submits that the words in the Act of Congress must be taken in their ordinary, usual meaning, as the only sense in which Congress can be supposed to have used them. Therefore, the appellant insists, with all due respect, that the word "freight" does not mean "passage money" or "the fares of passengers;" and that "*freight then pending*" does not mean either freight on goods prepaid, no longer contingent, and not recoverable back, or passage money similarly prepaid, and in no sense, therefore, "pending" at the time of the collision.. The appellant submits, with great respect, that the Circuit Court erred accordingly in including in the amount of its decree against the appellant on account of its liability for "freight then pending" at the time of the collision.

FIRST: The sum of $847.23, freight on goods, *prepaid* at the port of Bremen "under an express stipulation and agreement that said freight money so prepaid was not to be returned, goods lost or not lost."

SECONDLY: The sum of $5,200, also *prepaid* at Bremen for the passage money of immigrants who were on board of said ship at the time of the collision.

THOMAS W. HALL,

Counsel for Appellant.

Office Supreme Court U. S.
FILED.
JAN 19 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 233.

THE STEAMSHIP "MAIN" AND NORDDEUTSCHER LLOYD, *Claimant and Appellant,*

vs.

WILLIAM H. WILLIAMS,
Master of the Steamship "MONTANA," *Appellee.*

Appeal from the Circuit Court of the United States, for the District of Maryland.

APPELLEE'S BRIEF AND POINTS.

JOHN H. THOMAS,
GEORGE LEIPER THOMAS,
J. WILSON LEAKIN,
Attorneys for Appellee.

KING BROTHERS, PRINTERS, BALTIMORE.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 233.

THE STEAMSHIP "MAIN" AND NORDDEUTSCHER LLOYD, *Claimant and Appellant,*

vs.

WILLIAM H. WILLIAMS,
Master of the Steamship "MONTANA," *Appellee.*

Appeal from the Circuit Court of the United States, for the District of Maryland.

APPELLEE'S BRIEF AND POINTS.

The proceedings, out of which this appeal arose, originated in a libel filed by the appellee, on behalf of the owners of the steamship "Montana" and her cargo, against the steamship "Main," to recover damages, resulting from a collision, between those vessels, which the libel alleged and both Courts below decreed, was caused entirely by fault, on the part of the "Main." The appellant appeared as claimant and owner of the "Main," and filed a petition for a limitation of its liability, under sections 4283–4284, of the Revised Statutes of the United States.

Section 4283 limits the liability of the owner of the offending vessel, for damages, in such a case as that now under consideration, to the amount or value of the interest of such owner in such vessel "and her *freight then pending*."

Section 4284 provides that when in such a case, several freighters or owners of goods or other property, on the same voyage, suffer loss or damage, "and *the whole value of the vessel and her freight for the voyage*, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel, in proportion to their respective losses"; and for that purpose, they or the owner of the vessel may take appropriate proceedings in any Court, for the purpose of apportioning the sum for which the owner of the vessel may be liable, among the parties entitled thereto.

The value of the "Main" was agreed on between the parties and fixed by the Court at $70,000; and it was agreed, that on filing stipulation for the payment thereof into Court, whenever the same should be ordered, she should be released and discharged from the custody of the marshal.

The amount of freight pending, which the owner of the vessel should pay or secure to be paid into Court, being in dispute, that question was, by agreement, reserved. The Court eventually determined that amount to be $7070.10; and by its decree, ordered it to be paid into Court or secured.

An appeal was taken from that decree, and an appeal bond was given. On this appeal the Circuit Court made, as required by law, separate findings of facts and law. It found that the collision resulted entirely from fault, on the part of those in charge of the "Main." That the damages occasioned thereby to the owners of the "Montana" and her cargo amounted to $243,633.41. That the "Main" had on board of her at the time of said collision,

goods and merchandise, on which gross freight for the voyage from Bremen to Baltimore, to the amount of $1,162.80, was collectible at Baltimore; and on which gross freight for said voyage, to the amount of $847.23, had been prepaid at Bremen, under an express agreement that said freight so prepaid was "not to be returned, goods lost or not lost," making an aggregate of gross freight on said goods, including that so prepaid as aforesaid, as well as that collectible at Baltimore for said voyage from Bremen, of $2,010.03; that out of said freight money was to be deducted the sum of $26.41, paid for transportation of goods from England to Bremerhaven, and the sum of $113.52, paid for lighterage of said goods at Bremerhaven, leaving an actual amount of gross freight for said voyage, on said goods, the sum of $1,870.10; or $1,564.80, after deducting the cost of unloading cargo and other expenses incident thereto, at the port of Baltimore. That in addition to said gross freight money, there had been paid at Bremen the further sum of $5,200, gross passage money, for the immigrants, who were on board of said ship at the time of said collision; or, allowing for the commission received by the agents through whom the said passage money was prepaid, the sum of $4,550, net; without any deduction for the head money tax due under the laws of the United States at the port of Baltimore, on account of said immigrants; and that the aggregate amount of said gross freight, prepaid at Bremen and collectible at Baltimore, and of said gross passage money, prepaid at Bremen, for said voyage, was $7,070.10. The Court also found, as a matter of law, that the obligors in the appeal bond from the decree of the district Court, which fixed the last mentioned sum as the amount of the freight of the "Main," which was pending at the time of the collision, and ordered the same to be paid into Court or secured, were liable for said last mentioned sum, with interest from the date of said decree and costs, and decreed against them, for that amount, interest and costs.

The Court arrived at this result, by deducting the sum of $26.41, paid for transportation to Bremerhaven, and $113.52, paid for lighterage there, amounting in the aggregate to $139.93, from the sum of $2,010.03, gross freight, on goods, paid at Bremen and Baltimore, leaving $1,870.10, freight on said goods, for the voyage from Bremen to Baltimore; deducting nothing for expenses of unloading cargo and other expenses incident thereto, at Baltimore; treating the passage money as freight; deducting nothing for the ship agents' commissions, for procuring business, and nothing for "Head Money Tax."

Nothing is involved in this appeal but the propriety of the above stated conclusion of law and decree. The transcript of Record, first sent from the Circuit Court, contains matter, which, counsel on both sides think, has no bearing on these questions; matter with which they think this Court ought not to be troubled. By agreement between them, an agreed transcript of Record has been substituted, omitting that immaterial matter, and adding matter, which had been inadvertently omitted from the first-mentioned transcript of Record, and which they think is material to this appeal; reserving to each party the right to refer to the transcript of Record first filed, if necessary.

Points.

The appellee will contend:

1. That this Court is bound by the Findings of Fact in the Circuit Court, and cannot go beyond them, to find any other supposed facts.

Act of Congress, approved February 16, 1875, chapter 77, (18 Stat. L., 315.)

The Adriatic, 103 U. S. 730.

The Abbotsford, 98 U. S. 440.

The Benefactor, 102 U. S. 214-18.

Sun Mutual Ins. Co. vs. Ocean Ins. Co., 107 U. S. 500.

The Annie Lindsay, 104 U. S. 105-8.

This Court cannot, therefore, find that any "head money tax" was due; or consider such supposed fact, in passing on the propriety of said finding of law and of said decree.

2. The Court was right, in deciding that the appellant, the owner of the "Main," was responsible, to the extent of the gross amount of the freight on the cargo on board of her, at the time of said collision; the amount of "her freight then pending," as expressed in section 4283; to the extent of "the whole value of the vessel and her freight for the voyage," as expressed in section 4284; of her "freight, for the voyage," as expressed in the 54 Admiralty Rule of this Court; without deducting the expense of discharging the cargo at Baltimore, or the commissions paid at Bremen, for procuring the passenger business; and without making any distinction between freight paid in advance, and freight to be paid, on discharge of the cargo.

Section 4283 provides that "the liability of the owners of any vessel for any loss, damage or collision, &c., done, occasioned or incurred, without the privity or knowledge of such owner or owners shall, in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

Section 4284 provides that whenever the damage sustained by several freighters, &c., shall exceed in amount "*the whole value of the vessel and her freight for the voyage*," those sustaining such damage shall receive compensation from the owner of the vessel in proportion to their respective losses.

The appellant's petition for limitation of liability is under these two sections. It treats the measure of liability prescribed by them as co-extensive with each other and practically the same.

This Court has decided that section 4284 embraces damages arising from collision, and that the language, "the amount or value of the interest of such owner in

such vessel and her freight then pending," as used in section 4283, is co-extensive in meaning with the language, "the whole value of the vessel and her freight for the voyage," as used in section 4284.

13 Wall. 127-8

In the case of Norwich & New York Trans. Company vs. Wright, [redacted], this Court says: "It is objected, however, that the fourth section of the Act does not embrace cases of damage by collision, even though they are included in the third section. But an examination of the fourth section will show that its language is very broad. Coming immediately after the provisions of the third section, which, as we have seen, provide for all kinds of loss, damage and destruction (damage by collision included), it says that if any embezzlement, loss or destruction shall be suffered by several freighters or *owners* of goods, wares or merchandise, or *any property whatever* on the same voyage, and the whole value of the vessel and her freight for the voyage, shall not be sufficient, etc. Surely this language is broad enough to cover damage by collision, as well as other damages. And the close connection and dependency of the two sections require a construction to be given to the one co-extensive with that given to the other, if it can possibly be done without violence to the language."

This Court has, by its fifty-fourth Admiralty Rule, practically construed the sections of the Act in question, and made provision for carrying them into effect. It provides that "*the freight for the voyage*" shall be paid or secured to be paid into Court. Neither the statute nor the rule says anything about *net freight*, or makes any distinction between freight paid in advance and freight to be paid, on delivery of the cargo. Both provide that the ship owner, as a condition of obtaining a limitation of his liability, shall pay into Court, or give bond for *the whole freight*, the "freight then pending," as expressed by section 4283; "the whole value of the vessel

and her freight for the voyage," as expressed by section 4284, of the Revised Statutes; "the freight, for the voyage," as expressed by the rule.

The decisions, so far as we are aware, are uniform, to the effect, that "the amount or value" of the "owner's interest in the vessel," in the purview of this section, is the entire value of the vessel, without any deduction for liens or incumbrances.

The Leonard Richards, 41 Fed. Rep. 818.
In re The U. S. Grant, 45 Fed. Rep. 642.
2 Parsons on Ship. and Adm. 125.

So the amount or value of his interest in the "freight then pending," is the entire amount of such freight, without any deduction for the expense of earning it, such as cost of discharging cargo; or cost of procuring business, such as commissions paid to agents at Bremen. There is no more reason for deducting these expenses than there would be for deducting liens and incumbrances from the value of the vessel; or deducting from the freight the wages of the officers and crew, the cost of maintaining them, or any other ordinary expense of the voyage.

No Court, so far as we are aware, in applying this statute or this rule, has ever deducted from the freight any expenses incident to the earning of it, or of procuring business. Courts have, often and properly, deducted, as salvage, extraordinary expenses, incurred in saving the vessel or her freight, after the disaster; but not ordinary expenses of the voyage. A reference to the following decisions, we think, will sustain this view.

In the case of the Abbie C. Stubbs, 28 Fed. Rep. 720, Nelson, J., said: "When a ship owner sends his ship to sea, so far as his liability for collisions and other losses happening through the fault of those in charge of her, and without his privity or knowledge, is concerned, he puts at risk only his ship, the *expenses of navigating her* and the *freight she may earn on the voyage*. His responsibility is

limited to the capital embarked in the adventure, and the profits he may gain from it in the form of freight or its equivalent. * * *. The words, 'freight then pending,' as used in section 4283, must at least include *freight earned at the end of the voyage* for cargo at the time of the collision, which is this case. There is no deduction for the wages of the master and seaman after the collision, and the expense of a tug in towing the vessel from Monomoy Beach to New Bedford. These were not in any sense salvage services, but were the ordinary expenses of the voyage incurred in earning the freight."

This case is approved in the José Morè, 37 Fed. Rep. 122; and the question as to whether the owner was responsible, to the extent of the gross freight, or only of the net freight, was decided in the same way by Dr. Lushington, in the case of the Benares, 1 Eng. Law and Equity, 639–40.

The Statute under construction in the last mentioned case was 53 Geo. III, C. 159, S. 1, which limited the liability of a ship owner to the value of the vessel and "freight due or to grow due for the voyage." Dr. Lushington said: "What is the meaning that ought to be attached to the word 'freight' here? Whether it means the whole freight, whatever it might be, due in the course of the voyage, or whether any, and what deductions are proper to be made out of it? * * * There is nothing said on the present occasion as to how they are to ascertain the value of the ship, or the amount of the freight, or whether any deductions will take place or not. I apprehend it is quite clear that no deductions can be made on account of bottomry, mortgage, pilotage or towage or any other demand of that nature. * * * It appears to me that if there was any doubt as to the solution of a question of this kind, I should construe this Act of Parliament, with reference to the intention, if I can ascertain it, of the legislature—how far they would in reality damnify a person who had already suffered an unjust loss. The legislature have already limited his power to recover,

in words; but am I to go further and limit by my construction that right, which he originally had as a matter of justice and equity and according to all the Courts in this country. I am bound to construe this Act of Parliament as leaving the ancient law which unquestionably was founded upon principles of justice as nearly as it was before, giving effect and force to the literal meaning of the terms used by the legislature itself. I cannot extract from these terms that there was any intention whatever to allow all of the expenses which would be incurred during her voyage on the part of the owners of the ship, to be deducted *from the freight;* certainly not from the ship, and I think not *from the freight.* Therefore, I am of opinion that *the whole of the homeward freight* is liable to make good the damage incurred on the present occasion."

Mr. Justice Brett, in the case of the Ettrick, L. R. 6 P. D. 127, takes the same view, as to the principle by which the Court ought to be governed, in construing this statute, and speaks of it as "an act sufficiently tyrannical as it is." See also the opinion of Abbott, C. J., in Gale vs. Laurie, 5 B. & C. 156-63, in which the following language is used: "The effect, however, is to take away or abridge the right of recovering damages enjoyed by the subjects of this country at common law; and there is nothing to require a construction more favorable to the shipowner than the plain meaning of the words import."

3. Freight paid in advance is considered "freight then pending," or "freight for the voyage," in a proceeding like this.

Those who sustained damages, by reason of the collision, were not parties to the prepayment of freight or passage money, or to the contract, in reference thereto; and their rights can not be affected thereby.

In the case of the Express, 46 Fed. Rep. 855-68, the Court, in speaking of the effect of a contract between the owner of a vessel and another person, upon the rights of

one, not a party to such contract, states the question to be whether "or to what extent it is compatible with the principle or policy of any maritime law that an owner, by any form of contract, whether of towage or otherwise, should be allowed to procure the navigation of his vessel to be effected, without liability on her part for the injuries she inflicts on innocent third parties by her faulty navigation" * * * "to the prejudice of others, thus abolishing, at his mere volition, *pro tanto*, the general law of maritime liens allowed for the security of third persons."

Speaking of the effect of an agreement by the insured, as to freight paid in advance, upon the right of the insurers to recover it back, if not earned, Lord Denman says:

"I think it equally clear that they had no right, as against the insurers of that advanced freight, to barter away their right to recover it, as part of the damage sustained by the loss of the cargo."

Deforcet vs. Bishop, 18 Q. B. D. 378.

In considering this question, Justice Bailey, in Wilson vs. Dickson, 2 Barn. & Ald. 10–16, says: "The third and last question is, what is the true construction to put on the words 'freight due or to grow due,' and it seems to me that those words mean *all the freight for the voyage, whether paid in advance or not.* If the whole freight had been paid in advance, according to the argument, the defendants would be liable only for the value of the ship and not for the freight. It is clear, on the other hand, that it would come within the very words of the Act if the whole freight were due at the time of the loss; and it seems to me that it ought not to make any difference with respect to the owner's responsibility, whether the freight be in his pocket or in that of the person who would have to pay it. I therefore think that the words 'freight due or to grow due,' are meant to include all the freight of the voyage, and it makes no difference whether that *freight was paid in advance or not.*"

4. The fact that the freight paid in advance was so prepaid, under an agreement that it was "not to be returned, goods lost or not lost," cannot affect this question. Common carriers cannot legally stipulate for exemption from liability for the negligence or other faults of their employees.

Great Western Ins. Co. vs. Phenix Ins. Co., 129 U. S. 397.
Inman vs. S. C. R. R. Co., ibid, 128–39.
R. R. Co. vs. Lockwood, 17 Wall. 397.

5. The contract that the freight was not to be returned, was necessarily subject to the qualification or proviso that it should not be lost by any fault, on the part of the owner of the vessel or its agents. It is to be supposed to have been made in that sense. In the case, growing out of the loss of the "Lexington," there was an express agreement that the goods should be transported, at the risk of Harnden. This Court held that the agreement, as far as legal, was binding on the parties to the suit. If literally construed, it would have debarred the plaintiff from the right to recover. But this Court held that the loss had occurred, by reason of negligence, on the part of the defendant; that a contract to exempt it from the consequences of such negligence, would be void; and that the parties to it must be supposed to have meant that it should be qualified by an exception, as to such negligence. This Court there said:

"The special agreement in this case, under which the goods were shipped, provided that they should be carried, at the risk of Harnden; and that the respondents were not to be accountable to him or his employers, in any event, for loss or damage. The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties, upon any fair and reasonable construction of the agreement, were

we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipment and furniture, or in her management by the master and hands."

The N. J. S. Nav. Co. vs. The Merchants' Bank, 6 H. 383.

6. It is clear that freight paid in advance, if not earned, may be recovered back, if there be nothing to the contrary in the contract under which it was prepaid.

1 Pars. on Ship. & Ad. 210, Note 2.
3 Kent Comm. (226.)
The Kimball, 3 Wall. 44–57.
The Bird of Paradise, 5 Wall. 562.
In re Liverpool, &c. Co., 3 Fed. Rep. 168.
Benner vs. Equitable Ins. Co., 6 Allen 222.
Griggs vs. Austin, 3 Peck. 920–2.
Great Indian Pen., &c. Co. vs. Turnbull, 5 Asp. Mar. Law Case, 465.

In Brown vs. Harris, 2 Gray (Mass.) 360, it was decided that passage money, in the meaning of this rule, was *freight*, and that when paid in advance, and not earned, it could be recovered back.

7. The contract, therefore, in this case, qualified as this Court has said it is, by the exception as to negligence, is, that if the prepaid freight be lost or not earned, in consequence of any fault, on the part of the "MAIN," or her employees, it shall be returned to those who paid it. The Court below has found, and that finding is conclusive, that the collision was solely the result of fault, on the part of those who were in charge of the "MAIN." The same fault which resulted in such immense damage to the "MONTANA" and her cargo might have destroyed the "MAIN" and her cargo. In that event, her freight would have been lost, by her own fault; and the money paid for

it, in advance, could have been recovered back by those who paid it. The owner of the "MAIN" would have been liable for *the whole of it.* Its liability therefor, would not have been limited to the amount or value of its interest in the "MAIN" and her freight then pending.

In re Liverpool, &c., Co., 3 Fed. Rep. 168.

All of her freight was, in the purview of section 4283, "pending" at the time of the collision. All of it was, within the meaning of section 4284 and the 54th Admiralty Rule, "freight for the voyage." All of it was then at risk. On principle, by the language of the Act of Congress and of the rule of this Court, all of it ought to be paid, or secured to be paid, into Court, as a condition of limiting the liability of the appellant. The question is, not whether, as events have turned out, those who paid the freight in advance, can now recover it back. Of course, they cannot; because it has been earned. But the question is, could it have been recovered back, if it had not been earned, by reason of fault on the part of the "Main"; might it not have been recovered back, if the fault in the management of the "Main," which caused the disaster, had destroyed, as it might have done, all of her own cargo?. If her prepaid freight, so at risk, was "freight then pending" within the purview of section 4283 of the Revised Statutes, a part of "her whole freight," in the meaning of section 4284; if it was within the purview of the rule, "freight for the voyage," there is as much reason why it should be paid into Court as if it had not been paid in advance. In either case, the loss of the appellant would be the same, the loss of its freight, by reason of fault on the part of its own agents. In either case, the redress of the owners of the "Montana" and her cargo, would be the same; redress, to the extent of the interest of the owner of the "Main" in her and "her freight pending" at the time of the collision; "her freight for the voyage" she was then prosecuting.

8. Passage money was freight, within the meaning of the statute and of the rule.

The business of the great ocean steamers, known as "Ocean Grey-hounds," consists mainly of the transportation of passengers. Compensation therefor is always paid in advance. Their profits are larger than those of steamers carrying merchandise only; their rate of speed is greater and more dangerous to other vessels.

Congress can hardly have meant that those who realize for themselves the largest profit, who expose others to the greatest danger, should be liable, to the smallest amount.

"Freight," in the common acceptation of the term, means the price for the actual transportation of goods, by sea, from one place to another; but in its more extensive sense, it is applied to all rewards or compensations paid for the use of ships, including the transportation of passengers."

3 Kent's Com., (219.)

"All agreements for the carriage of *persons* or property by vessels, are contracts of affreightment, and all hire or reward for the use of vessels, is *freight*."

Benedict's Adm., section 286.

"There is nothing in principle to distinguish, in this respect, the transportation of human beings from that of other portions of animated nature. Men, as well as birds, and beasts and fishes, have, in all ages, been objects of maritime transportation. *Naulage*, *nolis*, from *naulum*, 'the freight or fare paid for passage on the sea in a ship,' is found in the earliest books." "Passengers are those who pay *freight* for the carriage of their persons and baggage."

Ibid., section 288.

The author, in support of the above, refers to—

Pard. Droit Com., section 704.

Cleirac. Termes de la Marine, 510. The Consulat, 68; and the Continental Codes, *passim*.

"Passenger ships and vessels are regulated by Acts of Congress, in most important particulars; and the business of transportation of passengers for freight, is now one of the most important and lucrative branches of maritime commerce."

Benedict's Adm. Prac., sect. 288.

The following definitions of "freight" are given in standard dictionaries, viz:

"In a more general sense, the price paid for the use of a ship, including the transportation of passengers."

2nd vol. Century Dictionary, word "freight."

"Any reward or compensation paid for the use of ships, including the transportation of passengers."

Burrell's Law Dictionary.

"All rewards or compensation paid for the use of ships."

1 Bouvier's Law Dic., page 194.

"In its widest sense it may include fare, for it is that with which anything is *fraught* or laden for transportation; and by a figure of speech, the price paid for the transportation."

Anderson's Dictionary of Law, 479.

See also Stroud's Judicial Dic. "Freight," pages 308–9.

"This term, in its most extensive sense, is applied to all rewards or compensation paid for the use of ships, including the transportation of passengers."

8 Am. & Eng. Ency. of Law, page 901, n. 1.

In the following extract from the original text of Les Bones Costumes de la Mar., and translation thereof, by

Sir Travers Twiss, the word "freight," and the word "nolit," of which it is a translation, are used to express the reward paid for the transportation of passengers:

"Con pelegri es dit tot home qui deia donar *nolit* de la sua *persona* sens sa mercaderia."

"The term passenger includes all who ought to pay *freight* for their *persons*, apart from their merchandise."

Les Bones Costumes de la Mar., chapter 1. The Black Book of the Admiralty, Appendix, Part III, edited by Sir Travers Twiss, Q. C. D. C. L., p. 51.

Tot hom es appellat *pelegri* qui do *nolit* de la sua *persona* e de roba qui no sia mercaderia, et tot hom qui port de deu quintars en avall, deu donar *nolit* de la sua persona.

Every man is called a passenger who pays *freight* for his own *person*, and for goods which are not merchandise. And every person who carries less than two quintals ought to pay *freight* for his own *person*.

E en aquella manera meteixa, de persona qui entra menys de voluntat del senyor o del scriva en la nau, es en voluntat del senyor de pendre quin *nolit* se volra.

And in this same manner with regard to any *person* who may come on board the ship without consent of the managing owner or of the ship's clerk, it is in the power of the managing owner to take what *freight* he pleases.

Note, by Ed. "he pleases" that is the highest *freight* charged for any *passenger*.

Costumes de La Mar, Chap. lxviii. Black Book App. III, pages 172–5.

In Giles vs. The Brig Cinthia, 1 Peters' Ad. 203, &c., the Court uses the following language:

"I think the force and true meaning of freight has been much misconstrued. It is a technical expression. It does not imply that it is the *naulum, merces or fare, for the transportation of goods.* It is applied to *all rewards*, hire

or *compensation paid for the use of ships*, either for an entire voyage, one divided into sections, or engaged by the month, or any period. It is also called *freight* and is to be determined by the like principles, in the case *of passengers*, transported in vessels for compensation.

"In *Saxon*, from which much of the English language is derived, it is called *fracht*, whether it be a compensation for transportation in ships by sea, or carriage by land, either of goods or persons, in gross or detail. Many of the commercial terms, as well as the laws and customs of the sea, are derived from the *Saxons*, who were, for a great length of time, the most extensively commercial and nautical people of Europe."

To the same effect is the decision in the case of Howland vs. The Brig Lavinia, Ibid. 136.

In Mulloy vs. Backer, 5 East, (321) counsel for the defendant argued "passage money as well as *freight* must follow the title to the ship." The judges replied as follows: Laurence, J., "Foreign writers consider passage-money the same as *freight*."

Lord Ellenborough, C. J. "Except for the purpose of lien, it is the *same thing*."

In Brown vs. Harris, 2 Gray, 359, the question was whether passage money, paid in advance and not earned, could be recovered back. The Court says: "Passage money and freight are governed by the same rules. Indeed *freight*, in its more extensive sense, is applied to all compensation for the use of ships, including transportation of passengers, and for all purposes except lien, Lord Ellenborough says, they seem to be the same thing."

It includes a proper allowance for the transportation of goods belonging to the owner of the ship.

In the case of Allen vs. Mackey, 1 Sprague, 224–5, Sprague, J., said: "It is argued (the same person owning

both ship and cargo), that no freight was to be *paid* in this case, and, therefore, none was pending. I think the expression '*freight pending*' is perhaps a little broader than that of the English Statute '*freight due or to grow due*,' and it may fairly cover the increased value of goods, conferred on them by their carriage, which is just as real a gain to the owner of the vessel, and just as real a payment by the owner of the goods in the one case as in the other. I take into consideration, also, that this statute limits a responsibility which existed at common law, and, therefore, must not be extended beyond the fair import of its language. I think that the earnings of the vessel, in transporting the goods of the owner, may well be deemed *freight*, in the meaning of this statute, and the amount to be what would have been a fair compensation for transporting the same goods, had they belonged to another person."

In Flint vs. Fleming, 1 B. & Ad. 48, the Court says:

"Freight, as used in the policy, means benefit derived from the employment of the ship." It was there held to include charter money. That decision was approved in the case of Inman Steamship Company vs. Bischoff, (L. R. 7 Ap. Cases, 678.)

In Penna. R. R. Co. vs. Sly, 65 Penna. State, 479, Sharswood, C. J., says: "The expression of freight does not exclude fare. It would be unreasonable in the highest degree, to suppose that the Legislature intended the one and not the other. Freight, indeed, in its wide sense, may include fare, for it is that with which anything is fraught; and by a figure of speech the price paid for the transportation." (211.)

Demurrage is treated as freight, in the meaning of this statute and rule.

In the case of the Giles Loring, 48 Fed. Rep. 472-3, it is said: "By the statute the limited liability is measured by

the value of the ship and freight pending. These values are to be taken at the time of the termination of the voyage."

"Demurrage should be regarded as freight pending. It was an amount due from the charterers to the ship owners for the use of the vessel; though not technically freight, it partakes so much of the same character, that it must be held subject to the same rule. It represents the earnings of the ship during the voyage or charter, in the performance of which losses were caused by the misconduct of the owner's agent, the master, for which, but for the limitation of the law, the owners would have been fully liable. There is no reason for allowing them to collect and retain it, and escape from the duty of giving the benefit of it to innocent losers. * * * Freight signifies the earnings or profit derived by the ship owner or hirer of a ship from the use of it himself or by letting it to others, or by carrying goods for others."

To borrow the language used in 65 Penna. St., ante: "It would be highly unreasonable to suppose" that Congress meant to include, in a measure of the liability of the owners of an offending vessel, every reward to which they are entitled, for the transportation of the goods of others; every benefit they may derive from the transportation of their own goods; to include even demurrage, because, in a strained sense, it may be considered "freight"; and meant, at the same time, to exclude the reward they received for the transportation of passengers. The language employed, is broad enough to embrace reward for the transportation of passengers, as well as for the transportation of goods. We can see no reason why Congress should have intended to include the one and exclude the other; we see nothing in the statute to indicate that it intended to do so. The reasonable interpretation of the statute is, that it includes both.

In construing the meaning of words, in the statute under consideration, Courts are governed by different

principles from those applicable to the construction of similar words, used in policies of insurance.

As to the British Statute, limiting the liability of ship owners, Abbott, C. J., says:

"Their effect, however, is to take away or abridge the right of recovering damages, enjoyed by the subjects of this country at the common law; and there is nothing to require a construction more favorable than the meaning of the word imports. It is true that in the case of insurance these stores are not considered as covered by an ordinary policy on the ship. But insurance is a matter of contract, and the construction of the contract depends, in many cases, upon usage; and the construction of a policy can furnish no rule for the construction of this Act of parliament, which was passed for purposes of a different nature."

Gale vs. Laurie, 5 B. & C. 164.

The following language of Lord Stowell, in the same case, called in the Court below, the Dundee, shows that, in his opinion, in construing the British Statutes, of similar import to ours, the innocent sufferer should have the benefit of every doubt; and no advantage should be given to one class of offending vessels over others, unless imperatively required by the words of the statute:

"The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship, upon the common principle applying to persons undertaking the conveyance of goods, that they were answerable for the conduct of the persons whom they employed, and of whom the other parties who suffered damage knew nothing and over whom they had no control."

"To these considerations I must add, that if the stores are not liable in contribution, this class of vessels is favored in a very unfair degree. If a ship is run down at

sea by a merchant vessel, the wrong doing vessel is, by the act that diminishes the general responsibility, still liable to contribute not only to the extent of herself, but to that of her freight outward, and of the freight homeward, if contracted for, and for what owners properly would have paid for freight if it had been liable for freight."

"This class of vessels (fishing vessels) is highly favored by the British Legislature, and most deservedly, &c." "But surely it can be no part of the intended encouragement, that they shall be qualified to do mischief at a cheaper rate than other vessels. If nothing but the vessel itself be liable, that would present a result apparently very unequal and unjust, not only to the injured vessels whose compensation was so much abridged, but likewise to all other vessels, which, having committed the like injuries, were subject to a much severer retribution."

The Dundee, 1 Hagg., Ad. 120–128.

The reasoning of this Court, in reply to the contention that the liability of ship owners, as carriers of passengers, was not intneded to be limited by the Act of 1851, it is submitted, is applicable to and disposes of the contention, now under consideration.

This Court said: "The carriage of passengers, in common with merchandise, is so common on the great highway between the old and the new continents at the present day, that a law of limited liability which should protect ship-owners in regard to injuries to goods, and not in regard to injuries to passengers, would be of very little service, in cases which would call for its application."

Butler vs. Boston Steamship Co., 130 U. S. 520-50.

The extent to which the carriage of passengers constitutes part of the business of Trans-Atlantic steamers, being considered evidence that Congress intended to limit the liability of the owners, for injuries to passengers, as

well as for injuries to goods, the same consideration requires, that the owners, to obtain a limitation of their liability, must pay, as was decreed in the Courts below, the earnings of the steamers, for passengers, as well as for goods, on the voyage which was pending, at the time their vessel inflicted the enormous damages, for which their liability was limited, to an amount comparatively so small.

The collision, in this case, occurred on the 5th of January, 1889. (See pages 1 and 2 of the Record, filed in this Court on 11th October, 1890.) The Act of Congress passed 26th June, 1884, (23 Stat. ch. 121, sec. 18, p. 57,) was then in force. By it, the liability of the owner, instead of being limited, as theretofore, to "the amount or value *of the interest of such owner* in such vessel and her freight then pending," is limited to "the value of *such vessel and freight pending.*"

This Court has said, that the above-mentioned section "seems to have been intended as explanatory of the intent of Congress in this class of legislation."

Butler vs. The Boston Steamship Co., 130 U. S. 555.

The alteration of phraseology, limiting the liability of the owners to the value of the vessel and her freight, instead of to the value of the owner's interest in them, removes any doubt, which might have existed, under the Act of 1851, sections 4283-4 of the Revised Statutes.

It seems clear, that the measure of the owner's liability includes "*freight or passage money,*" whether paid in advance or not; without any deduction for the expense of earning either.

The language of this Court, as well as that of counsel, in the case of the "Scotland," sustains our contentions. The owners of the "Scotland" were sued for damages, resulting from a collision between her and another vessel. They relied on their right to a limitation of liability.

Her voyage was broken up by the collision. She earned no freight for the carriage of goods. Her passage money had been paid in advance. She did not earn any part of that, because she paid back what she had received from those who were not forwarded to their destination, and expended the balance in defraying the expense of the board of the others, after the collision, and in the cost of transporting them to their destination, by another vessel, the "Queen," the last-mentioned items being in the nature of salvage expenses.

The counsel contended that "the vessel having been lost by the collision, and no *freight or passage money earned*, the respondents are thereby discharged from any liability on account thereof." This Court, after disposing of the other questions involved in the appeal, says:

"If any further inquiries are necessary to be made, in order to ascertain the proper amount to be paid by the respondents, as depending upon the value of the articles saved, including *freight or passage money realized*, the Court below can institute them, in the proper way."

The Scotland, 105 U. S. 26, 27 and 35.

This seems clearly to indicate that the word "freight," as used in the Acts of Congress, now under consideration, includes "passage money;" that it is immaterial whether it be paid in advance or at the end of the voyage; that the liability of the owners therefor, depends solely upon the amount realized, in other words, earned by them; upon the gross, not the net amount thereof.

It is submitted, therefore, that the findings of facts by the Circuit Court, justified its finding of law and its decree; and that its decree ought to be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1893. No. 233.

THE STEAMSHIP "MAIN" AND NORDDEUTSCHER LLOYD, *Claimant and Appellant,*

vs.

WILLIAM H. WILLIAMS,
Master of the Steamship "MONTANA," *Appellee.*

Appeal from the Circuit Court of the United States, for the District of Maryland.

APPELLEE'S SUPPLEMENTAL BRIEF.

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The references and quotations of the counsel for the appellant, on pages 6 and 7 of his brief, are misleading.

Maclachlan, pages 474–5, was not considering whether "freight" included the reward paid for the transportation of living beings, brute or human; but the distinction between the payment for merely *taking on board* anything for transportation, and the payment for *transportation.* The former, if the duty of the ship, in reference to it, be not performed, may be recovered back, not as *freight*, but as a payment made for a consideration which has failed; the latter may be recovered back, as *freight.* Reference to

other pages of the commentator make it clear that he did not intend to make the distinction between "freight" and "passage money," attributed to him by the counsel for the appellant. On page 490, he says: "But although the delivery of the goods at the place of destination is in general necessary to entitle the owner to freight, yet with respect to living animals, whether *men* or cattle, which may frequently die during the voyage, without fault or neglect, on the part of the ship, it is said, that if there be no express agreement whether the reward is to be paid for lading or for transporting them, *freight* shall be paid as well for the dead, as for the living; if the agreement be to pay for the lading and undertaking to carry them, their death certainly cannot deprive the owners of the reward; but if the agreement be to pay *freight* for transporting them, then no *freight* is due for those that die on the voyage, because, as to them, the contract is not performed."

Machlachlan on Shipping, page 490.

The case of Britton vs. Barnaby, 21 H. 533, did not involve the question now under consideration. None of the facts in it rendered it necessary for the Court to consider the meaning of the word "freight," except for the transportation of goods. The goods, in that case, had been carried, under a bill of lading. The question was whether the consignee could be required to pay freight, on each parcel of them, as it was ready for delivery; or whether he was entitled to wait until the whole of his cargo was ready for delivery, and he could see whether the duty of the ship, in reference to the whole of it, had been performed, before he could be required to pay for any of it. In that sense, and in that only, for that purpose, and that only, did it become necessary for the Court to consider or define the meaning of the word "freight."

The quotation from Abbott leaves out words, which show that the meaning of that author was entirely different from that attributed to him by the counsel.

The full sentence is as follows:

"Passage money has been held not to be freight *within the meaning of the particular contract, in the case of Lewis vs. Marshall*, 7 Man. & Gr. 729."

Abbott on Shipping, 13 Ed., page 538.

The author gives a concise statement of the written contract between the parties, which was the subject of controversy, in that case. It made a distinction between the freight to be paid for the goods and fare to be paid for the passengers. The broker had contracted to load the ship, at rates of freight to average 40s. per ton, and at least nine cabin passengers, the passage money to average, &c. There was no room to contend that freight included passage money. The contract provided otherwise.

The language of the author, in other parts of the same book, leaves no room to doubt that he considered *freight* to include passage money. He says:

"But although the delivery of the goods at the place of destination is, in general, necessary to entitle the owner to the freight, yet, with respect to living animals, whether *men* or cattle, which may frequently die during the voyage, without any fault or neglect of the persons belonging to the ship, it is said (Dig. 14, 2, 10, Roccus not. 76, 77, 78, Molloy, Book 2, ch. 4, sect. 8; see also Moffat vs. E. I. Co., 10 East, 438,) that, if there be no express agreement whether the *freight* is to be paid for the lading or for the transporting them, *freight* shall be paid for the dead as for the living; if the agreement be to pay *freight* for the lading them, then their death certainly cannot deprive the owners of the freight; but, if the agreement be to pay *freight* for transporting them, then no *freight* is due for those that die on the voyage, because as to them, the consideration is not performed."

Abbott, Ship. (13th Ed.) 534.

In another place, he says:

"Fletcher was to have the freight of goods, but the *freight* of passengers was reserved to the defendant."

Ib. page 37.

"If a pregnant woman be delivered, during the voyage, no *freight* is due for the infant."

Ib. page 546, citing Roccus, note 79.

Molloy says:

"If freight be contracted for the loading of certain cattle, &c., the whole *freight* is become due, as well for the dead as the living. But if the *freight* be contracted for the transporting them, if death happens, there ariseth no more freight than only for such as are living, at the ship's arrival at her port of discharge, and not for the dead. If the cattle or slaves are sent ~~abroad~~, and no agreement is made either for lading or transporting them, but generally, then *freight* shall be paid for the dead as the living. If *freight* be contracted for the transporting of women, and they happen on the voyage to be delivered of children on shipboard, no *freight* becomes due for the infants."

Molloy De Jure Maritimo et Navali, Book 2, chapter 4, section 8; see also section 16.

In Denoon vs. Home, &c. Assurance Co., L. R. 7 C. P. 341, the insurance was on "chartered freight." The rate of insurance on that, and on the charge for transporting coolies for the same voyage, was different. No chartered freight was obtained. Instead thereof, coolies, not contemplated by insurer or insured, were taken on board; held, under the circumstances, that the insurance did not cover the price to be paid for their transportation.

Moffatt vs. E. I. Co., 10 East, 468–74.

The charter party provided that a certain price should be paid "for each passenger *ordered aboard*," not for each

one who should be carried to his destination; held, that although they were not carried to their destination, the amount paid for them could not be recovered back, because it was not paid for carrying them; but for the expense of providing food and accommodation for them, which would be the same, whether the vessel should reach her destination or be lost.

The language quoted on page 8, of the brief, from the decision of this Court in the case of the City of Norwich, is in accordance with our contentions.

"Pending freight is of no value to the ship until it is earned, and it is not earned, if earned at all, until the conclusion of the voyage."

118 U. S., 491.

In the same volume, this Court said that the decision last referred to settled all of the questions involved, in the case of the Scotland, except whether the insurance on the vessel took the place of the vessel itself, as a measure of the owner's liability. (118 U. S., 518.) The freight and passage money of the Scotland, had both been paid in advance. The Court treated them as in the same category. (105 U. S., 26-7-36.) It held that the liability, as to them, and the time at which the value of them was to be estimated, had both been determined by the decisions in the case of the City of Norwich.

118 U. S., 518.

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